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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1050

LEE E. TARVESTAD
GEORGE A. WYUM,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Robert Vogel
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Mandan, North Dakota
58554

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ATTORNEYS FOR PETITIONERS

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IN THE

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GEORGE A. WYUM,

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-vs-

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Lee E. Tarvestad and George A. Wyum, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit rendered and entered

against the petitioners on the 10th day of December, 1969. The opinion upon which this judgment is based is dated December 10, 1969. The opinion has not been officially reported in the Reporter System; however, copies of the opinion are attached.

JURISDICTION OF THIS COURT

The petitioners rely upon the provisions of Amendments V and VI to the United States Constitution which prevent them from being deprived of life, liberty or property, without due process of law and guarantees that they shall enjoy the right to a trial by an impartial jury of the district wherein the crime shall have been committed.

QUESTIONS PRESENTED FOR REVIEW

I

Were defendants unconstitutionally prevented from discovering what use, if any, was made of evidence which the trial court held was obtained from them under compulsory self-incrimination?

II

Did the Trial Court err, and unconstitutionally deprive the defendants of their right to have the case against them proved beyond a reasonable doubt, by the following instruction:

> "There is nothing peculiarly different in the manner in which a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them."?

III

Does this case call for the renunciation of the "Concurrent Sentence Rule"?

IV

Did the Court err in its rulings on non-production of documents under the Jencks Act (18 U.S.C. 3500)?

V

Did the Court deprive defendant Wyum of his constitutional right to a fair trial by excluding evidence as to his state of mind (Scienter) because of a misapprehension as to the hearsay rule?

VI

Were the defendants unconstitutionally deprived of their right to a fair trial by the Court's refusal to permit defense counsel to examine notes being

used at the witness stand to refresh the recollection of government witnesses?

VII

Were defendants deprived of a fair trial by the reception in evidence, over objection, of summaries of documents not in evidence and not in the court room?

VIII

Did the federal trial judge fail to protect the petitioners from prejudicial pretrial and trial publicity thereby depriving the petitioners of a fair trial consistent with due process?

IX

Did the United States Court of Appeals for the Eighth Circuit render a decision in this case in conflict with decisions of the United States Courts of

Appeal for the Third and Tenth Circuits and with the United States Court of Appeals for the District of Columbia Circuit as to burden of proof of mental competency?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V to the United States Constitution, as applicable here, reads as follows:

> "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law ... ."

Amendment VI to the United States Constitution, as applicable here, reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a ... trial by an

impartial jury of the ... district wherein the crime shall have been committed ... ."

The Jencks Act (18 U.S.C. 3500) reads:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States, and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess

proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the intersts of justice require that a mis-trial be declared.

(e) The term 'statement', as used in subsections (b), (c), and (d), of this section in relation to any wigness called by the United States, means:

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical,

electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

A CONCISE STATEMENT OF THE CASE

The appellants were charged with five counts of mail fraud (18 U.S.C. 1341), 16 counts of violations of securities laws (15 U.S.C. 77q(a) and 15 U.S.C. 77e), and with a super-erogatory county of conspiracy (18 U.S.C. 371).

The charges stem from the operations of a corporation, Dalco American Enterprises, Inc., previously known as Dakota Lumber and Builders, Incorporated, hereinafter referred to as "Dalco".

Defendant Tarvestad, during the period covered by the indictment, was a major stockholder and president of the company. Defendant Wyum joined the company as a salesman and, after investing about $20,000.00, became one of the several vice-presidents. The secretary-treasurer, James Herzog, also vice-president part of the time, kept the books and records of the company. He testified for the government and was not indicted.

During the period covered by the indictment the corporation expanded rapidly. It built many homes, it began prefabricating wall sections for homes, and constructed commercial buildings. It set up a system of franchises

of dealerships, whereby small contractors were given architectural assistance, pricing information, guaranteed prices, and technical assistance. The expansion caused, at times, shortages of working capital, but financial statements prepared by Herzog (and, according to Wyum, relied upon by him) showed the company was increasing its profit and its surplus.

To alleviate the shortage of working capital a program was established to sell stock and corporate notes. Wyum was active in this field.

Dalco did not register with the Securities and Exchange Commission, since the officere believed, on advice of counsel, that Dalco was exempt under the Interstate Exemption

from registration

The Government called many investor witnesses, who testified to representations made to them.

Tarvestad's defense was that he was mentally incompetent during the period of the indictment due to his addiction to a drug, Placidyl, originally prescribed for relief of nervous tension after the death of a close associate in the company in 1963. The testimony conclusively shows his addiction to the drug, aberrant conduct during the term of the indictment, and ultimate hallucinations, hospitalization, electroshock treatment and continuing psychiatric care up to the time of trial. Two psychiatrists testified in his behalf

and a government psychiatrist (to whom reference will be made later) testified for the Government.

Because of the nature of Tarvestad's defense, the main burden of the defense factually fell to Wyum. He presented a detailed defense, both as to the factual basis for the Government's contentions and as to his own knowledge and state of mind. The presentation of the defense of both defendants takes nearly 1000 pages of the 3071-page transcript.

In sum, the defendants claim that they were being prosecuted for an ordinary business failure, and that they acted in good faith throughout. They showed that they lost a great

deal of their own money in the company and did not profit at all.

Although the Court of Appeals stated that the defendants did not question the sufficiency of the evidence against them, this is incorrect. However, in this petition we must, of course, restrict ourselves to legal questions.

These questions relate to a pre-trial motion to dismiss the indictment because of compulsory self-incrimination of the defendants at a hearing before the referee in bankruptcy, to an error in the instructions to the jury which watered down and diluted the burden of proof in a criminal case, to the use by the Court of Appeals of the "Concurrent Sentence Rule", to alleged errors in

the lower court's ruling on non-production of documents under the Jencks Act, to refusal of the lower court to permit defendant Wyum to testify as to his own state of mind and the basis for it, and errors of the trial court in refusing defense counsel permission to examine notes used by a witness to refresh his recollection, and the use of summaries of documents not in evidence and not in the court room.

ARGUMENT

I. The defendants were compelled, over specific objections that their answers would tend to incriminate them, to testify at a hearing held before a referee in bankruptcy (See Pretrial Motion No. 1). The trial court held that the testimony so given was inadmissible (Tr. 1704-7). But, at a hearing on a pretrial motion to dismiss the indictment, when the defendants, attempting to inquire into the use made of the evidence obtained in violation of their rights, called the Assistant United States Attorney as a witness, the trial court refused to let him testify. At the trial, when testimony relative to the subject matter of the incriminating

questioning was offered, the defendants moved for a mistrial, which was denied. Each defendant was thus foreclosed from the opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a "fruit of the poisonous tree", Nardone v. United States, 308 U.S. 338, 60 S. Ct. 26, 84 L.Ed. 307.

Where the United States Attorney is the "only other party present in court ..." with knowledge of the facts, he may be called by the opposite side as a witness. United States v. Fiorillo, 376 F.2d 180, 2 Cir. 1967. The Eighth Circuit is in accord. Gajewski v. United States, 8th Cir. 321 F.2d 261. The Court of Appeals held that it was not

improper to use evidence illegally obtained before the grand jury, and that, if the objection were directed to evidence at the trial court level, a motion to suppress was required. The Court of Appeals made no mention of the fact that defendants, when evidence relating to the subject matter of the hearing before the referee in bankruptcy came before the trial court, moved for a mistrial. The Court of Appeals likewise ignored the fact that the defendants made a substantial effort, at the pretrial level, to find out what use had been made of the evidence illegally obtained, but were foreclosed from doing so.

The inquiry of the Court of Appeals

therefore missed the point raised by the appellants -- that the action of the trial court, in refusing to allow the assistant United States Attorney to be interrogated, foreclosed the defendants from ascertaining what use had been made of the evidence illegally obtained, as they were entitled to, under the Nardone rule. Clearly, the defendants cannot move to suppress evidence discovered as a result of leads obtained from illegal and unconstitutional self-incrimination unless they are allowed to inquire from someone who knows the facts as to the use made of the illegally obtained answers.

Further, the Court of Appeals erred in restricting the defendants to a

motion to suppress. It is proper to object at the trial level to the introduction of evidence even though a pretrial motion has been denied. Gouled v. United States, (1921), 255 U.S. 298, 65 L.Ed. 647, 41 S.Ct. 261.

II. The Court of Appeals conceded that this instruction was error, saying:

> "Defendant maintains that this is inconsistent with the requirement that in a criminal case the evidence must be such so as to prove guilt beyond a reasonable doubt. We must agree. The instruction has no legal foundation and should not have been given."

However, it called the error "insubstantial".

We respectfully suggest that the right of the defendant to have the case against him proved beyond a reasonable doubt should not be watered down and diluted by such language as the trial court used. The right to have the evidence prove the case beyond a reasonable doubt is too basic for that.

The error is magnified by the fact

that the quoted instruction is given on page 59 of the Court's Instructions, the last page of instructions, and thus constituted the last word to the jury before they went into the jury room.

III. The Court of Appeals, by using the barely viable "Concurrent Sentence Rule" (See Benton v. Maryland, 395 U.S. 784 (1969)) avoids consideration of sixteen counts of the twenty-two count indictment, considering only six "Non-registration" counts.

If the concurrent sentence rule has "continuing validity as a rule of judicial convenience", Benton v. Maryland, supra, we ask that this Court examine, as the Court of Appeals did not do, whether the evidentiary errors in this case tainted all of the counts, including the six considered by the Court of Appeals. For example, by applying the concurrent sentence rule, the Court of Appeals avoided ruling on

serious questions of application of the Jencks Act, stating that

> "... None of the statements withheld are relevant to the nonregistration charges, and would therefore otherwise fall within the harmless error rule as to the counts under consideration", citing Rosenberg v. United States, 360 U.S.367, and Killian v. United States, 368 U.S. 231.

It should be noted that Rosenberg related only to information otherwise available to the defendant, and Killian involved a remand to the trial court to determine whether, like Rosenberg, the defense already had the information. There is no claim here that defendants already had the information contained in the statements in question, so neither Rosenberg nor Killian is apropos.

The Court of Appeals comes near to holding that the lower Court erred in refusing to supply the Jencks Act material -- it states that

> "Viewing these documents as a whole, it is evident that the trial judge did not err in refusing production of all memorandums". (Emphasis added).

The clear import is that some of the memoranda should have been produced. The need for producing them is then excused by reference to the concurrent sentence rule and inapropos citation of Rosenberg and Killian, supra.

We suggest that the violations of the mandate of the Jencks Act infected the whole trial and the concurrent sentence rule should not save the verdict.

IV. There appears to be a conflict between the Circuits on the producibility under the Jencks Act of reports made by government agents who have testified. Holmes v. United States, 4th Cir. 1959, 271 F.2d 635; United States v. Keig, 7th Cir. 1964, 334 F.2d 823.

Frank A. Rome, a government accountant, who testified at length, had participated in the preparation of the criminal reference report, and had also interviewed approximately fifteen witnesses, some of whom testified and some of whom did not. At one point (Tr. 1783-4) he referred to making interviews which were necessary to complete "our ... criminal reference report". Yet, the Court, after examination, refused to permit the production of the criminal reference

report and some of the statements taken by Rome.

We suggest this is error, almost conceded by the Court of Appeals. See Discussion under Point III above.

V. The trial court repeatedly excluded proferred testimony of defendant Wyum as to statements made to defendant Wyum by the Secretary-Treasurer of the defunct corporation, James Herzog, upon which Wyum relied in making the statements which the government alleged to be fraudulent.

Wyum spent most of his time on the road and got his information as to the financial condition of the company largely from Herzog. In making the statement to the customers, which the Government alleged were fraudulent, Wyum relied on information he obtained from Herzog. When he attempted to testify as to such statements made by Herzog, the Government objected that the

statements were hearsay, and the Court sustained the objection.

Wyum offered the evidence, not to establish the truth of the statements, but only to establish that they were made and that Wyum relied upon them, and as bearing upon Wyum's state of mind and its reasonableness.

The statements should have been received in evidence under a universally recognized exception to the hearsay rule. Phillips v. United States, 356 F.2d 297, 307; Harrison v. United States, 200 F.2d 663, 674-5; McCormick on Evidence, Sec. 225, 228; Wigmore, Evidence, Vol. VI, Sec. 1766.

Where the case relies so heavily on intent as this one did, it is

obviously crippling to deprive a defendant of an opportunity to show the basis for his state of mind.

VI. Government witness Frank A. Rome, an accountant, used memoranda to refresh his recollection on the witness stand. Defense counsel demanded an opportunity to examine the notes, and the government objected on the ground that the papers had not "been marked and received in evidence". The Court refused to order the production of the statements.

Defense had an absolute right to examine the notes. United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 84 L.Ed. 1129, 60 S.Ct. 811; Lennon v. United States, 20 F.2d 490, 493, 494 (8th Cir.); Wigmore on Evidence, Third Ed., Sec. 762.

Such improper limitations on cross-

examination of the government's most important witness could only have prejudiced the defendants.

VII. Government witness Frank A. Rome, an accountant, summarized the government's case in chief by presenting summaries, some in poster form, which were received in evidence over objection from the defendants that the summaries were based, in part on documents not in evidence and not in the court room. It was proved that some of the information was not in evidence and not in the court room. Admission of such summaries is reversible error. Wilkes v. United States, 80 F.2d 285; Bruce v. United States, 351 F.2d 318; Oertle v. United States, 370 F.2d 719; United States v. Kianie, 258 F.2d 924.

VIII. On October 26, 1964, the petitioners filed a voluntary bankruptcy petition under Chapter XI for Dalco American Enterprises, Inc., a corporation of which petitioners were two of its officers. From that very moment and for the next three years until petitioners were convicted in Federal Court, the entire news media, press, radio and television, in North Dakota and surrounding states, published massive, constant, virulent and inflammatory prejudicial pre-trial and trial publicity concerning the conduct and activities of the petitioners. The jurors, even before being selected, were exposed to this news making it impossible for the petitioners to even

select an impartial jury. And these unfair and prejudicial news comments didn't abate when the actual trial began. Instead they increased in intensity during the six weeks trial and the jury was daily subjected to this coverage because it was not sequestered. Your petitioners rely on the rules laid down by this court in Sheppard v. Maxwell, 86 S.Ct. 1507 (1966) concerning the requirements of due process and how those rights are affected in the case at bar by prejudicial news prior to and during the trial.

Necessarily your petitioners cannot, in this petition, be brief and at the same time produce for inspection the

voluminous television, radio and newspaper articles to support petitioners' allegations. However, should this petition be granted, your petitioners will do so.

IX. In United States v. Currens, 290 F.2d 751 (1961) the 3rd Circuit Court of Appeals was confronted with a similar problem as is in issue in this case. In the Currens case, it is true the trial court found the defendant incompetent to stand trial and therefore committed him to the Medical Center for Federal Prisoners at Springfield, Missouri, whereas in this case the lower court didn't adjudicate the defendant incompetent but merely committed the defendant, Tarvestad, to said Center to determine his ability to stand trial. However, the distinguishing and significant difference between the Currens case and this one is that the Court in Currens said:

> "... the orders confining him to ... the Springfield Medical Center are enough to provoke inquiry as to Currens' capacity to commit the offense charged in the indictment. It is clear therefore that Currens has met the initial burden imposed on him by the Davis, Tatum and Fitts decisions and that the burden was shifted to the United States to prove beyond a reasonable doubt that Currens possessed the necessary mental capacity, the guilty mind or mens rea, to be guilty of the crime with which he was charged."

In other words, your petitioner, Tarvestad, claims the Third Circuit Court of Appeals unlike the Eighth Circuit Court takes the position that once the government, because of the facts before and surrounding the defendant's pretrial mental examination has reason to doubt and suspect defendant's sanity,

commits the defendant to a government hospital, even though it's done solely to determine defendant's competency to stand trial and not to determine his competency at the time of the alleged crime, that the presumption of sanity then shifts to the government to prove, in its case in chief, that the defendant was competent at the time of the alleged crime. In this case the Government wholly and totally failed so to do. See Tatum v. United States, 1951, 88 U.S. App. D.C. 386, 190 F.2d 612; Fitts v. United States, 10 Cir. 1960, 284 F.2d 108.

Furthermore, in this case the defendant after having been committed to the Federal Medical Center only to deter-

mine his competency to stand trial, was interviewed just once in a ten minute session by a government psychiatrist and defendant was asked about six questions. Certainly, these and other facts bring the decision in this case into conflict with analagous facts and a conflicting opinion in Winn v. United States, 270 F.2d 326 (D.C.Cir. 1959).

Petitioners recognize that petitions for writs of certiorari are sparingly granted. But because of the failure of the Federal District Court and the Eighth Circuit Court of Appeals to apply proper constitutional standards to the defendants, insofar as pre-trial and trial publicity was concerned, and because the defendant, Tarvestad, was incompetent at the time of his alleged crimes and because other defendants in these United States are and will be similarly situated, and because there is a conflict of opinion existing between the various Circuit Courts of Appeal as to the burden of proving competency or lack of it, and because all courts should

should be advised of the proper standards, it is respectfully submitted that the petitioners' prayer for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit be granted.

Dated January 6, 1970.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

LEE TARVESTAD and
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Petitioners,

-vs-

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss
COUNTY OF MORTON)

Clara Karls, being first duly sworn on oath deposes and says that she is a citizen of the United States over the age of twenty-one years, and not a party to the above entitled matter;

That on the 7th day of January, 1970, this affiant deposited in the mailing department of the United States Postoffice at Mandan, North Dakota, a true and correct copy of the following document filed in the above captioned action:

1. Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

That the copies of the above document were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Mr. Harold O. Bullis
United States Attorney
P. O. Box 292
Fargo, North Dakota 58102

To the best of your affiant's knowledge, information and belief, such address as given above was the actual postoffice address of the party intended to be so served.

Clara Karls

Clara Karls

Subscribed and sworn to before me this 7th day of January, 1970.

Lois J. Helmer

(SEAL)

Lois J. Helmer, Notary Public
Morton County, North Dakota
My commission expires 7/19/74

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OCTOBER TERM, 1969

No. 1050

LEE E. TARVESTAD and
GEORGE A. WYUM,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

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IN THE

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LEE TARVESTAD and
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SUPPLEMENT TO

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE

EIGHTH CIRCUIT

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1969 (Appendix, pp. 3,5). The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

Order Staying Mandate was issued December 29, 1969, staying the mandate for thirty days and thereafter subject to further order of the Court.

(This statement is made to correct an erroneous jurisdictional statement in the original Petition).

Dated January 30, 1970.

Respectfully submitted,

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Attorney for Lee E. Tarvestad

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By Robert Vogel

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19110 —

September Term, 1969

LEE A. TARVESTAD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

THIS CAUSE came on to be heard on the record from the United States District Court for the District of North Dakota and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court,

That the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ordered that the defendant in the said District Court, Lee E. Tarvestad, do surrender himself to the custody of the United States Marshal for the District of North Dakota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

December 10, 1969

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19111

September Term, 1969

GEORGE A. WYUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

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And it is further ordered by this Court, that the defendant in the said District Court, George A. Wyum, do surrender himself to the custody of the United States Marshal for the District of North Dakota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

December 10, 1969

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	CRIMINAL
v.	)	No. 9171
	)	
GEORGE A. WYUM.	)	(Indictment - 22 Counts)

JUDGMENT AND COMMITMENT

and

ORDER OF PROBATION

On this 28th day of November, 1967, came Kermit Edward Bye, Assistant U.S. Attorney, the attorney for the government and the defendant appeared in person and with his attorney, Mr. Robert Vogel, of Mandan, North Dakota.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

employing a scheme to defraud in the sale of securities, in violation of Section 77q(a), T. 15, U.S.C., as charged in Counts 1 to 10, Incl., of the Indictment; mail fraud in the offer and sale of securities, in violation of Section 1341, T. 18, U.S.C., as charged in Counts 11 to 15, Incl., of the Indictment; transmission by mail of securities after sale without being registered with the Securities & Exchange Commission, in violation of Section 77e(a) (2), T. 15, U.S.C., as charged in Counts 16 to 21, Incl., of the Indictment; and conspiracy to commit certain offenses against the United States, in violation of Section 371, T. 18, U.S.C., as charged in Count 22 of the Indictment, and the court having asked the defendant whether he has anything to

say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) months, commencing at Ten o'clock A.M. this date, upon each of the Counts 1 through 20 of the Indictment, both numbers inclusive, said sentence on each count to run concurrently and not consecutively;

On Counts 21 and 22, respectively, both numbers inclusive, said defendant be placed upon probation for a period of five (5) years, such probation to begin

upon the date of release from confinement under the sentence imposed on Counts 1 through 20 of the Indictment.

IT IS FURTHER ORDERED that the defendant, George A. Wyum, be released to the custody of his attorney, Mr. Robert Vogel, for a period of 48 hours to enable said defendant to furnish bond on appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/S/ RONALD N. DAVIES
United States
District Judge

Certified this 28th day of November, A.D. 1967.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NORTH DAKOTA

SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	CRIMINAL
v.	)	No. 9171
	)	
LEE E. TARVESTAD.	)	(Indictment - 22 Counts)

JUDGMENT AND COMMITMENT

and

ORDER OF PROBATION

On this 28th day of November, 1967, Kermit Edward Bye, Assistant U. S. Attorney, the attorney for the government and the defendant appeared in person and with his attorney, Mr. Lyle Huseby of Fargo, North Dakota.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of employing a scheme to defraud in the

sale of securities, in violation of Section 77q(a), T. 15, U.S.C., as charged in Counts 1 to 10, Incl., of the Indictment; mail fraud in the offer and sale of securities, in violation of Section 1341, T. 18, U.S.C., as charged in Counts 11 to 15, Incl., of the Indictment; transmission by mail of securities after sale without being registered with the Securities & Exchange Commission, in violation of Section 77e(a) (2), T. 15, U.S.C., as charged in Counts 16 to 21, Incl., of the Indictment; and conspiracy to commit certain offenses against the United States, in violation of Section 371, T. 18, U.S.C., as charged in Count 22 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient

cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) months commencing at Ten O'clock A.M. this date upon each of Counts 1 through 20 of the Indictment, both numbers inclusive, said sentence on each Count to run concurrently and not consecutively; that on Counts 21 and 22, respectively, both numbers inclusive, said defendant be placed upon probation for a period of Five (5) years, such probation to begin upon the date of said defendant's release from confinement under the sentence imposed on Counts 1 through 20 of the

Indictment.

IT IS FURTHER ORDERED that the defendant, Lee E. Tarvestad, be released to the custody of his attorney, Mr. Lyle Huseby, for a period of 48 hours, to enable said defendant to furnish bond on appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/S/ RONALD N. DAVIES
U. S. District Judge

Certified this 28th day of November, A.D. 1967.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 19,110

Lee E. Tarvestad,
Appellant,

v.

United States of America,
Appellee.

No. 19,111

George A. Wyum,
Appellant,

v.

United States of America,
Appellee.

Appeals from the United States District Court for the District of North Dakota.

[December 10, 1969.]

Before VAN OOSTERHOUT, Chief Judge; LAY and HEANEY, Circuit Judges.

LAY, Circuit Judge.

Defendants were convicted under a 22-count indictment which included five counts of mail fraud in violation of

18 U.S.C. § 1341, ten counts of fraud in the sale of securities in violation of 15 U.S.C. § 77q(a), six counts of selling securities without registering them with the SEC in violation of 15 U.S.C. § 77e, and one count of conspiracy in violation of 18 U.S.C. § 371. Trial lasted for six weeks, 65 witnesses appeared for the government, five for the defendant Tarvestad and nine for the defendant Wyum. Over 400 exhibits were admitted into evidence. After the jury verdict the trial court, the Honorable Ronald N. Davies, sentenced both defendants to the custody of the Attorney General for a period of eighteen months with five years probation to follow on each and every count, the sentence to run concurrently. This appeal followed. We affirm.

The charges arose out of the sale of unregistered securities issued by Dalco American Enterprises, Inc., a North Dakota corporation; Dalco American Mortgage, a division of Dalco American Enterprises; and Continental Mortgage Company, a wholly owned subsidiary of Dalco American Enterprises. The sales, which took place over a period extending from January of 1963 to October of 1964 were made to approximately 470 investors in North Dakota, South Dakota, Minnesota and Iowa.

Lee Tarvestad became president of Dalco American Enterprises, Inc. (hereinafter Dalco) in 1961 and chairman of the board of directors in 1963. George Wyum, began working for Dalco as a salesman in 1962, and later became its vice president. The two defendants were the company's largest stockholders. Under their management the corporation expanded from the sale of lumber into the prefabrication of wall sections for homes and the construction of commercial buildings. They also set up a franchise system of dealerships, providing small contrac-

tors with architectural assistance, pricing information, guaranteed pricing and technical assistance.

In January of 1963 the defendants organized Dalco American Mortgage, with a separate downtown office, and sold 6½% and later, 7% demand notes. Passbooks and signature cards were used. A large part of the sales campaign was launched through the mails, although both television and radio advertisements were also used. These promotional activities and a prepared brochure assured potential buyers that a large capital reserve insured by the federal government would be maintained. It was also represented that the investments would be protected by first mortgages, and that all the assets and resources of Dalco American would stand behind them. Employees who sold the notes were instructed to state that a 40% reserve would be maintained. For a period from February to August of 1963, a reserve of $24,000 was maintained, although this was far less than the promised 40%. However, even this was eventually liquidated.

The second major revenue producing effort involved the sale of Dalco common stock at $2.25 a share with a promise of later repurchase at $3. Purchasers were told that their stock was made available for sale by the death of an officer of the corporation. In actuality the stock had not been previously issued. The defendants had in fact previously bought the stock of the deceased officer from his estate at $1 a share.

The final arrangement, implemented as the financial condition of Dalco worsened, involved the sale of fractional interests in the first mortgages of Continental. These sales by Continental were in large part conducted by mail. Brochures promised that money invested would be backed by first mortgages and that money could be withdrawn at

any time. Many investors received only "ghost" mortgages which did not actually represent any interest in real estate.

Many of these sales were made at a time when the corporation was no longer solvent. Nevertheless, throughout the period all published financial information was done so as to give the appearance of financial health and solvency. On October 26, 1964, Dalco filed a voluntary bankruptcy petition under Chapter XI with the defendants included in the list of debtors-in-possession. When this was unsuccessful the corporation was adjudicated a bankrupt on June 11, 1965.

Throughout this period no registration statement was ever filed for any of the securities sales. On at least two occasions the defendants were informed by a SEC inspector that such action was necessary. Sales continued, in four states, at the defendants' direction. Before withdrawals of $204,634, $1,072,511 had been invested in the three companies.

The basic defense urged by Tarvestad was that he was mentally incompetent throughout the period covered by the indictments. The defendant Wyum asserted that the collapse of Dalco was an honest business failure and that he at all times acted in good faith.

Under the concurrent sentence rule as long as a conviction is proper upon at least one count, it will support the judgment. *Barenblatt* v. *United States,* 360 U.S. 109, 115 (1959). The concurrent sentence rule is still viable where prejudice does not patently appear, see *Benton* v. *Maryland,* 395 U.S. 784 (1969), and collateral legal consequences are remote, *Kauffmann* v. *United States,* 414 F.2d 1022, 1024 (8 Cir. 1969). We have explored the entire record

and the multitude of contentions made by defendants and find no prejudicial error. Under the concurrent sentence rule we confine our written discussion to the six counts of selling securities without registration with the SEC in violation of 15 U.S.C. § 77e.

Instructions.

The basic complaints related to nonregistration are premised upon defendants' exception to the instructions. Defendant asserts that the trial court (1) failed to emphasize the requirement of "willfullness" in order to sustain a criminal violation of 15 U.S.C. § 77e; (2) failed to instruct upon the defense of "good faith"; (3) failed to instruct upon "evil motive" as a necessary proof to sustain conviction; (4) failed to properly instruct as to "advice of counsel"; (5) failed to properly instruct as to what is a "security"; (6) failed to properly instruct on "reasonable doubt"; and (7) failed to give defendant's requested instruction as to the proper consideration to be given Wyum's prior conviction of a felony.

In order to sustain a criminal prosecution under § 77e(a) it must be shown that the acts were done "willfully." 15 U.S.C. § 77x. The district court instructed that the government must prove five elements:

> "A sale of a security as charged.
> "That the subject of the sale was a security within the terms of the Securities Act of 1933.
> "That the mails were used for delivery of a security after sale as charged in the indictment.
> "That the security was not registered with the Securities and Exchange Commission at the time the mails were used.
> "That the defendant under consideration committed the above-described acts willfully."

See *United States* v. *Abrams,* 357 F.2d 539, 546 (2 Cir. 1966); *Kistner* v. *United States,* 332 F.2d 978, 981 (8 Cir. 1964).

The Supreme Court has pointed out that the term "willful" is a word with many connotations and that its particular use governs its particular construction. *Spies* v. *United States,* 317 U.S. 492, 497 (1943); cf. *United States* v. *Benjamin,* 328 F.2d 854, 862 (2 Cir. 1964). Some courts, including this circuit, have held or at least intimated, that the term "willful" under a § 77e(a) et seq. violation requires only evidence to establish that a defendant intentionally sold or delivered unregistered securities by use of the mails. It has been held that actual knowledge that a security was being sold in violation of the law is not a necessary element absent a charge of fraud. See e.g., *United States* v. *Sussman,* 37 F.Supp. 294 (E.D. Pa. 1941); Loss, Securities Reg. 1309-12 (2d ed. 1961); cf. *Kistner* v. *United States,* 332 F.2d 978 (8 Cir. 1964). Contrary holdings exist. See e.g., *United States* v. *Crosby,* 294 F.2d 928 (2 Cir. 1961), which requires evidence of guilty knowledge on the part of defendants. Some courts have held as in *United States* v. *Dardi,* 330 F.2d 316 (2 Cir. 1964), that the instructions and proof submitted were broad enough to satisfy either test. Without retreating from the dictum of *Kistner,* we find this case to be on all fours with the *Dardi* case. The trial court instructed:

> "An act is done 'willfully' if it is done knowingly and deliberately with bad purpose. In determining whether a defendant has acted willfully, however, it is not necessary for the government to show that any defendant knew he was breaking any particular law.
>
> "Knowledge and willfulness of a defendant need not be proved by direct evidence, and, like any other fact in issue, may be established by circumstantial

> evidence. Here, as in other phases of this case, the significant fact is the defendant's state of mind."

The court gave an instruction that good faith was a complete defense to all charges; it also gave a proper instruction that the "advice of counsel" rule was to be considered as a factor in determining good faith. When these instructions are considered with the above instruction as to willfulness and "bad purpose" they adequately set out any requirement for evil motive or guilty knowledge. "Evil motive" and "bad purpose" are words of equivalent meaning. *Screws* v. *United States,* 325 U.S. 91, 101 (1945).

Objection was also made that the court's instruction on advice of counsel required the jury to find the extraneous element of good faith of the attorney consulted. We think this is an artificial construction. Nor can we accept the proposition that legal advice itself under all circumstances constitutes complete immunity. As said in *Linden* v. *United States,* 254 F. 2d 560, 568 (4 Cir. 1958):

> "To hold otherwise would be to say that no matter how violative of law a defendant's conduct may be, and regardless of consciousness of wrongdoing on his part and his adviser's, the advice confers immunity. No such doctrine has been given legal sanction."

Objection is made as to the trial court giving an "over balance" of "government instructions" as compared to requested "defense instructions." The record, however, demonstrates that the defendant requested six different instructions pertaining to nonregistration and that all six instructions were given by the court. Further objection is made that the court failed to emphasize the requirement of willfulness and the defense of "good faith" in each of the counts. Some of the instructions of which defendant complains, however, incorporate by reference the five ele-

ments required to be proven by the government, as previously set forth. These elements include the necessity of proof of "willfulness." The instructions also set forth that good faith was a complete defense. When the instructions are considered as a whole, we find no prejudice or error in the emphasis or lack of emphasis of either government or defense theories.

Additionally, defendants contend that shares or partial assignment of mortgages are not "securities" under § 77e. They excepted to the portion of the trial court's instruction on securities that stated that the term "participation in a profits sharing agreement" is self-explanatory. Without a further specific request of definition, the court's instruction in the language of the statute (§ 77b) is sufficient. See *Rimerman* v. *United States,* 374 F.2d 251 (8 Cir. 1967); *Williams* v. *United States,* 328 F.2d 256, 262 (8 Cir. 1964). The court submitted the question to the jury as to whether the partial assignments of mortgages were within the act. Under the circumstances surrounding their sale, we have no difficulty in approving the submission of the question to the jury.

Counsel further objects to the rejection of their request as to the proper consideration to be given to the defendant Wyum's prior conviction of a felony. The government during trial offered proof that Wyum had been convicted on a state charge in North Dakota for selling securities without a license. At the time this was offered the trial court properly limited the jury's consideration of this evidence to that of affecting credibility of the defendant. The court's failure to repeat this instruction at the close of the case was not prejudicial error. Cf. *Franano* v. *United States,* 310 F.2d 533, 539 (8 Cir. 1962); *Troutman* v. *United States,* 100 F.2d 628, 634 (10 Cir. 1939).

However, defendant asserts that the trial court affirmatively instructed upon this conviction with erroneous language. The court did instruct in part as follows:

> "If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused did the acts charged in the indictment, then the jury may consider evidence as to an alleged earlier offense, in determining the state of mind or intent with which the accused did the acts charged in the indictment."

The government urges that the trial court was referring to evidence of other securities sales not specifically alleged as counts in the indictment. We have held that where intent and knowledge are essential elements of an offense, evidence of acts similar in nature and closely related in time to those in the indictment are admissible to prove intent and guilty knowledge. See *Von Feldt and Inland Oil Co.* v. *United States,* 407 F.2d 95 (8 Cir. 1969).

The problem here, as pointed out by defendant's counsel in his oral exception, is that the instruction could be interpreted to apply to Wyum's prior conviction. Under the language used, without further clarification, we find the instruction erroneous. However, in view of the prior limiting instruction and in consideration of the overwhelming evidence of guilt on Wyum's part, we hold the error to be harmless, having no substantial effect upon the jury.

Defendant also asserts error in the trial court's instruction that "[t]here is nothing peculiarly different in the manner in which a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them." Defendant maintains that this is inconsistent with the requirement that in a criminal case the evidence must be such so as to prove guilt beyond a reasonable doubt. We

must agree. The instruction has no legal foundation and should not have been given.

However, the trial court did instruct the jury that all elements of the offenses charged must be proven beyond a reasonable doubt. The court repeated this several times. In weighing the prejudicial effect of the above instruction we are not faced with the singular application of a different standard to a specific element of the offense in contrast to the other elements to be proven. Cf. *Stump* v. *Bennett*, 398 F.2d 111 (8 Cir. 1968). Here the instruction is given generally and at best lends some ambiguity without further reference. However, once again viewing the record as a whole, we find the asserted error insubstantial and the verdict and judgment must stand. *Kotteakos* v. *United States*, 328 U.S. 750, 764-765; *Harrington* v. *California*, 395 U.S. 250 (1969).

Defendant also excepts to many evidentiary rulings and comments of the trial court. We have examined these in detail and find no basis of prejudicial error. There is no complaint as to the sufficiency of the evidence to support a conviction on any of the counts. Nor could there be. The evidence, as we have briefly summarized, clearly shows guilt on all counts. There is no showing here that the trial court at any time "calculated to disparage" the defense in the eyes of the jury. Cf. *Goldstein* v. *United States*, 63 F.2d 609 (8 Cir. 1933); *Woodring* v. *United States*, 311 F.2d 417 (8 Cir. 1963); *United States* v. *Spica*, 413 F.2d 129 (8 Cir. 1969). Throughout a long trial such as this there are bound to be errors along the way. However, the law, as has been stated many times, does not require a perfect trial. Prejudice must be shown as arising from such errors, prejudice to the extent that it may be said that it reasonably could influence a trier of fact as a

determinant in decision. Not every error requires reversal. See *Wright* v. *United States,* 389 F.2d 996 (8 Cir. 1968). Under the record of this case, we fail to find any evidentiary ruling or trial conduct by the court or government which compels reversal.

Fifth Amendment Issue.

Before trial, defendants were required to testify over objection, before the referee in bankruptcy as to certain incriminating facts. The trial court ruled "any evidence adduced during the hearing before the Referee Dim as to which Mr. Wyum claimed a personal privilege under the Fifth Amendment, irrespective of whether he was required to answer or not, to be inadmissible." Defendant Wyum complains that he was denied the right to call the United States Attorney for the purpose of developing which evidence taken from the bankruptcy proceeding had been used before the grand jury. Defendant relies upon *Nardone* v. *United States,* 308 U.S. 338 (1939).

It has been consistently held that grand jury consideration of evidence obtained from illegal origins does not render the indictment defective. *Costello* v. *United States,* 350 U.S. 359 (1956); *Lawn* v. *United States,* 355 U.S. 339 (1958); *West* v. *United States,* 359 F.2d 50 (8 Cir. 1966). As stated in *United States* v. *Blue,* 384 U.S. 251, 255 (1966):

> "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial."

If on the other hand the contention relates to tainted evidence to be used at trial, as under *Nardone,* the proper

objection is required. However, no motion to suppress any specific evidence was ever made at trial. And even assuming the proper objection to have been made, the record affirmatively demonstrates that the government was not relying upon any evidence given by the defendant at the bankruptcy hearing, but upon independent books and records of the banks and of the corporation.

The Jencks Act Issue.

Defense counsel also maintain that government statements determined by the trial court to be non-obtainable by the defendant, should have been produced under the Jencks Act. 18 U.S.C. § 3500.

The Jencks Act has been construed to include the "interview report," which is largely a rearrangement of earlier notes adopted by the witness. See *Campbell* v. *United States,* 373 U.S. 487 (1963). However, summaries of oral statements which were prepared after the interview without the aid of complete notes and which rest on the memory of the agent are not to be produced nor are statements that contain the agent's interpretations or impressions. See *Palermo* v. *United States,* 360 U.S. 343, 352-353 (1959); *United States* v. *Aviles,* 337 F.2d 552 (2 Cir. 1964).

The trial court examined the statements *en camera.* These same statements (sealed for review here by the trial court) are in large part interviews taken by SEC agents of purchasers who were defrauded. It is readily apparent that many of these statments are incomplete. Furthermore, it must be noted that few of them were typed on the day of the interview. Viewing these documents as a whole, it is evident the trial judge did not err in refusing production of all memorandums. A great many statements

were produced voluntarily by the government. In any event, none of the statements withheld are relevant to the nonregistration charges, and would therefore otherwise fall within the harmless error rule as to the counts under consideration. See *Rosenberg* v. *United States,* 360 U.S. 367 (1959); *Killian* v. *United States,* 368 U.S. 231, 243-244 (1961); *Cline* v. *United States,* 395 F.2d 138 (8 Cir. 1968).

Tarvestad's Defense: Mental Incompetency.

This brings us to the defense raised singularly by Tarvestad. Tarvestad asserts error in that (1) judgment of acquittal should have been entered because the government failed to prove the defendant's sanity beyond a reasonable doubt in its case in chief; (2) the overall evidence affirmatively failed to show that defendant was sane and competent at the time of the alleged violations; and (3) the court should have instructed the jury that if the defendant was acquitted by reason of insanity that he would be confined in a hospital for the insane as long as the public safety and welfare required it.[1]

Although defendant was confined and examined prior to trial in the Federal Medical Center pursuant to 18 U.S.C. § 4244, there was never an adjudication of mental incompetency. It is well settled that the presumption of sanity controls until some evidence to rebut the presumption is offered by *the defendant.* When this occurs the government is then required to prove legal sanity beyond a reasonable doubt. *Davis* v. *United States,* 160 U.S. 469, 486 (1895); *Dusky* v. *United States,* 295 F.2d 743, 754 (8 Cir. 1961). The burden is not otherwise shifted unless

1 We need not discuss this contention, beyond citation of *Pope* v. *United States,* 372 F.2d 710 (8 Cir. 1967). We there pointed out this practice is peculiar to the District of Columbia under District of Columbia Code 24.301. See also *Alexander* v. *United States,* 380 F.2d 33 (8 Cir. 1967).

there has been an adjudication of incompetency prior to trial. See *Hurt* v. *United States,* 327 F.2d 978 (8 Cir. 1964); *Ashley* v. *Pescor,* 147 F.2d 318 (8 Cir., 1945). Defendant relies upon *United States* v. *Currens,* 290 F.2d 751 (3 Cir. 1961). Assuming *Currens* holds to the contrary, a viewpoint we do not share, the case is nevertheless distinguishable in that Currens at one time had been adjudicated incompetent before trial.

Tarvestad challenges the foundation as to the admissibility of the government psychiatrist's testimony that defendant was competent at the time of the alleged offenses. The record shows that the government doctor saw the defendant on but one occasion and defendant urges that this was insufficient to establish a basis of opinion. Defendant relies upon *Winn* v. *United States,* 270 F.2d 326 (D.C. Cir. 1959). However, *Winn* must be considered in light of *Jones* v. *United States,* 284 F. 2d 245 (D.C. Cir. 1960) and *Carey* v. *United States,* 296 F.2d 422 (D.C. Cir. 1961). Where opinion is based upon an examination not limited in scope, the testimony may be admitted. Here the government doctor was familiar with the psychiatric and phychological data gathered from tests throughout the period of November 29, 1966 to February 1967. He had studied the reports of doctors who had examined the defendant during that time. His examination was not limited to the determination of competency to stand trial. Under the circumstances we find the court did not err in admitting the doctor's opinion; defendant's complaints relate to credibility not admissibility.

Beyond the expert opinion offered, there exists substantial evidence of Tarvestad's conduct throughout the period involved. Lay witnesses verified Tarvestad's mannerisms and characteristics including his speech and conversations,

his letters, reports and overall ability to competently deal in business operations. Cf. *Dusky* v. *United States*, 295 F.2d 743, 757 (8 Cir. 1961); *Mason* v. *United States*, 402 F.2d 732 (8 Cir. 1968). Under standards we have previously discussed the evidence of competency was properly submitted to the jury. See cases collected in *Iyotte* v. *United States*, 402 F.2d 698 (8 Cir. 1968) and *United States* v. *Leeper*, 413 F.2d 123 (8 Cir. 1969).

Judgments of convictions affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

STATE OF NORTH DAKOTA)
) ss
COUNTY OF MORTON)

I, Clara Karls, stenographer in the office of Robert Vogel, attorney of record for George A. Wyum, one of the appellants herein, depose and say that on February 2, 1970, I served a copy of the foregoing

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS - 8TH CIRCUIT

on the United States of America, appellee herein, by mailing a copy thereof, in a duly addressed envelope, with air mail postage prepaid, to

Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D.C.

and by mailing a copy thereof, in a duly addressed envelope, with first class postage

prepaid, to

Harold O. Bullis
United States Attorney
P. O. Box 292
Fargo, North Dakota 58102

counsel of record for said appellee.

Clara Karls

Subscribed and sworn to before me

this 2nd day of February, 1970.

Lois J. Helmer

(SEAL)

Lois J. Helmer
Notary Public
Morton County, North Dakota
My commission expires:
July 19, 1974.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1050

LEE D. TARVESTAD AND GEORGE A. WYUM,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (5 R. 1-15)[1] is not yet reported.

[1] "T." preceded by the volume number refers to the 25-volume trial transcript.
"1 R." refers to the one-volume court of appeals record which contains the indictment, the preliminary motions and the rulings made as to them, and other allied papers.
"2 R." refers to a transcript of a pretrial attempt by the defense to interrogate the prosecution (see Pet. 17-20).
"3 R." refers to requested instructions and the exceptions taken thereto.
"4 R." contains the court's instructions to the jurors.
"5 R." contains the opinion of the court of appeals. All such volumes are on file with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1969. Mr. Justice White extended the time for filing a petition for a writ of certiorari to February 6, 1970, and on January 9, 1970, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government relied upon tainted evidence at trial.
2. Whether the instructions were prejudicial.
3. Whether the defense were denied statements of government witnesses to which they were entitled under 18 U.S.C. 3500.
4. Whether the trial court excluded evidence of petitioner Wyum's good faith.
5. Whether the testimony of a Securities and Exchange Commission accountant as to the results of his audit of the corporate books and his tracing of the investors' checks was proper.
6. Whether the government met its burden of proving petitioner Tarvestad's mental responsibility.

STATEMENT

After a jury trial in the United States District Court for the District of North Dakota, petitioners were convicted on each count of a twenty-two count indictment. Ten counts charged the fraudulent sale or transmission of securities and six counts charged the sale of non-registered securities (counts 1-10, 16-

21, 15 U.S.C. 77e, 77q(a), five counts charged mail fraud (counts 11-15, 18 U.S.C. 1341), and one count charged conspiracy (count 22, 18 U.S.C. 371). On November 28, 1967, each petitioner was sentenced to concurrent sentences on the first twenty counts of eighteen months' imprisonment, and to five years probation on the remaining two counts; probation was made consecutive to the term of imprisonment (1 R. 193-194). The court of appeals affirmed (5 R. 1-15).

The evidence is summarized in the opinion of the court below (5 R. 1-15). Briefly, it showed that during the period 1963-1965, the two petitioners were the controlling stockholders in a North Dakota corporation, Dalco American Enterprises, Inc., a lumber firm which built homes and engaged in other types of light construction. Through a division and a subsidiary of this corporation, petitioners sold securities to the public (1 T. 47, 49, 63). Such sales were made by petitioners personally or through a sales force trained by them (2 T. 227-233, 21 T. 2061). The securities were of three types: unsecured promissory notes carrying a 6½ to 7% rate of interest (19 T. 2429), shares of stock in their own corporation, and, later, "assignments" of fractional interests in mortgages which the corporation was thereafter to acquire (1 T. 47). The sales of the three types of securities were accompanied by representations (proved at trial to be false) as to the net worth of petitioners' corporation and the safety of the sums invested in the corporation and its securities (1 T. 65, 73, 14 T. 1799, 16 T. 2026-2027). For example, petitioners failed in a substantial man-

ner to maintain the reserve funds which the investors were told would be maintained to safeguard their investments (13 T. 1677, 16 T. 2030, 17 T. 2095, 2098). Nor were the investments which petitioners' corporation made with the public's money insured by any government agency, as promised in the sales literature (15 T. 1830-1832, 22 T. 2675). In addition, some of the checks received from public investors were not deposited to the credit of the corporation, but, instead, went into the personal bank accounts of the petitioners (14 T. 1722, 1771, 20 T. 2467-2469, 22 T. 2661, 2675, 2678-2679). Such interest as was paid to investors in the mortgage "assignments" came from the funds of other investors (13 T. 1699).

The three types of securities were extensively advertised. Some sales involved the use of the mails, and some sales were made in states other than North Dakota (2 T. 243, 21 T. 2601, 2672, 22 T. 2662). On at least two occasions petitioners had been told by a Securities and Exchange Commission attorney of the need to register such securities with the Commission; but the securities were never registered (21 T. 2589-2592, 2602-2603, 2612, 25 T. 3046-3048). In all, the public invested approximately $900,000 in the three types of securities (1 T. 51, 13 T. 1674). In June 1965, when petitioners' corporation was placed in involuntary bankruptcy, its debts exceeded its assets by approximately $1,500,000 (2 T. 156).

ARGUMENT

The court of appeals affirmed petitioners' convictions after having "explored the entire record and the multitude of contentions" raised by petitioners and finding no prejudicial error. The court confined its written opinion, however, to the six counts charging the sale of unregistered securities on the view that where "prejudice does not patently appear" the concurrent sentence rule has continuing vitality under *Benton* v. *Maryland*, 395 U.S. 784. While we believe that this approach was entirely appropriate, we have undertaken, for the convenience of the Court, to meet each of petitioners' substantive contentions.

1. In August 1965, at a hearing in bankruptcy, petitioners were questioned about their status in the corporation and various phases of its operations, including a question about a dishonored check on which an investor from Minot, North Dakota had stopped payment. To most such questions, petitioners claimed the privilege against self-incrimination. However, they were ordered to and did answer some of the questions, and petitioner Wyum acknowledged that he thought his company had received the North Dakota check. He refused, on the ground of self-incrimination, to state whether he knew that payment had been stopped; this refusal was sustained (1 R. 175-177).

Subsequently, petitioners claimed that the indictment rested "solely" on evidence illegally obtained at the bankruptcy proceedings, and the trial court

granted a pretrial hearing to consider that claim (1 R. 157-160, 226). At this hearing, the defense asked the prosecutor whether the trustee who had made the inquiries at the bankruptcy hearing had testified before the grand jury, and if the prosecution had used the information furnished at the bankruptcy hearing for leads in obtaining the indictment (2 R. 2-3). The prosecutor objected to any interrogation about his efforts, but stated that the evidence before the grand jury was "other than that contained in the testimony taken before the referee" (2 R. 4). No transcript had been made of the trustee's grand jury testimony, but the prosecutor believed that the trustee had not related petitioners' testimony at the August 1965 bankruptcy hearing. He stated that other witnesses besides the trustee had testified before the grand jury (2 R. 6-7). When the defense presented no evidence in support of its motion to quash the indictment, the court denied the motion (2 R. 9).

At trial, reference was made to the dishonored check from the Minot, North Dakota investor. This occurred during the testimony of the Commission accountant, Rome, as to what the corporate books showed. Counsel for petitioner Wyum then moved for a mistrial. The court denied the motion but ruled that none of the information obtained from petitioners at the bankruptcy hearing could be used by the prosecution at trial (14 T. 1704-1706).

As the court of appeals held (5 R. 12), the government complied with this order. The information petitioners gave the trustee under protest at the bankruptcy hearing was limited in scope, and did not

identify the victims listed in the twenty-one substantive offenses charged. The bearing of the dishonored check was slight. In any event, petitioner furnished no "lead" to the check at the bankruptcy hearing; the government's information about it came from the corporate records. Similarly, there was no connection between the trial evidence of the interstate sale of securities and petitioners' bankruptcy hearing answers. Those sales were testified to by corporate employees and by the victims, whose names were obtained from corporate records (*e.g.*, 2 T. 227-233, 243, 3 T. 284, 22 T. 2662, 25 T. 3032). In fact, it was stipulated at trial that petitioner Wyum had opened a Minnesota bank account (14 T. 1722-1723), and Wyum testified that some of the checks given to him by investors who were residents of that state went into that account and were used by him for a personal investment (22 T. 2661, 2677-2679). Accordingly, it is clear that such information as petitioners did give to the trustee, over protest, had no bearing on the return of the indictment [2] nor the convictions at trial.

2. Petitioners' challenges to the instructions (Pet. 22-23) were comprehensively dealt with by the courts below and properly rejected as nonprejudicial (5 R. 10). Thus, while the trial court did charge

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[2] Petitioners do not now challenge the validity of the indictment on this ground. At all events, as the court of appeals held, an indictment is not invalid because it may have been based in part on evidence that would have been inadmissible at trial. *Costello* v. *United States*, 350 U.S. 359, 364; *Lawn* v. *United States*, 355 U.S. 339; *United States* v. *Andrews*, 381 F. 2d 377 (C.A. 2), certiorari denied, 390 U.S. 960.

that "[t]here is nothing peculiarly different in the manner in which a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them" (Pet. 3, 22-23), the impact of this comment was insubstantial when viewed against the instructions in their entirety. On several occasions in its instructions the trial court made clear that all elements of the offenses charged had to be proved beyond a reasonable doubt. It properly defined a reasonable doubt as a fair doubt based upon reason and common-sense and arising from the state of the evidence, and correctly stated that proof beyond a reasonable doubt is established if the evidence is such that the jurors would be willing to rely and act upon it in the most important affairs of their own lives. The jury was cautioned that a defendant was not to be convicted on mere suspicion or conjecture (4 R. 2, 10). Indeed on the page where the portion of the instruction objected to appears (4 R. 59), the trial court cautioned that if petitioners "* * * not [be] proved guilty beyond a reasonable doubt * * * say so."

3. There is no substance to the contention (Pet. 24-28) that petitioners were denied statements of witnesses—particularly government witness Rome—to which they were entitled under the "Jencks Act", 18 U.S.C. 3500.

The trial transcript shows that the defense was furnished copies of the witnesses' pretrial statements (*e.g.*, 4 T. 467-468, 500, 8 T. 1007, 9 T. 1104). When Rome finished testifying, the prosecution told the

court it had no such statements of Rome's to furnish the defense. The court, nevertheless, ordered the government to produce all reports Rome had made, for its own *in camera* inspection. When this was done, some of the reports were furnished to the defense and the others were sealed (14 T. 1743-1746, 1752-1756). One report which the court did not furnish to the defense was a Commission "Criminal Reference Report". This report had not been signed; the government stated that Rome had merely furnished figures for inclusion in it, and that the report itself was for internal use only (14 T. 1752-1753).[3] Other reports concerned brief interviews which Rome had had with some witnesses, usually by telephone, as a minor part of his auditing duties. (13 T. 1667, 14 T. 1783-1784; cf. Pet. 27-28). There is no indication that any of these reports are fairly attributable to agent Rome as his "statement" within the intendment of 18 U.S.C. 3500, cf. *Clancy* v. *United States*, 365 U.S. 312, or, on this record, that the trial judge abused his discretion with regard to the production of statements of government witnesses. See *United States* v. *Augenblick*, 393 U.S. 348, 355.

4. It is contended the trial court "repeatedly excluded" profferred testimony about statements allegedly made to petitioner Wyum by Herzog, his corporate subordinate, regarding the financial condition of the corporation (Pet. 29-30), and thereby deprived Wyum

[3] The defense does not appear to have made any request for the production of this report (see 14 T. 1752-1754, 1784).

of a fair trial on the issue of his state of mind. There is, however, no factual basis in the transcript for the claim. While it is true that the court occasionally excluded such evidence as hearsay (20 T. 2487-2489), the transcript shows that Wyum repeatedly invoked Herzog's name and Herzog's information as being the cause of his belief in the honesty of his representations to investors. (See, *e.g.*, 20 T. 2458, 2491-2492, 22 T. 2500, 2514-2515, 2653, 2660, 2666.)[4] Moreover, the jury was instructed on the effect of honest errors of judgment and a good faith belief in the success of an enterprise (4 R. 26, 46).[5]

5. The contention that the government was allowed to introduce summaries of matters not in evidence through Rome's testimony is insubstantial. Rome testified extensively about what the corporate books showed and about his ability to trace checks

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[4] On one occasion, for example, Wyum's counsel inquired about Wyum's state of mind concerning the protection being given to investors, after speaking with Herzog. Petitioner Wyum replied that he "felt that everything was being taken care of the way it should be" (20 T. 2489).

Herzog, who was called as a government rebuttal witness, denied having given petitioner Wyum such assurances. He stated, instead, that he had told Wyum of the corporation's perilous financial condition (24 T. 2941).

[5] *Phillips* v. *United States*, 356 F. 2d 297 (C.A. 9), relied on by petitioners, is not in point. In that case, a conviction was reversed because there had been no showing that hearsay complaints, received by subordinates, had been called to the attention of an individual defendant. In the present case, there is no assertion that subordinates suppressed complaints, and petitioners, who attended board of director meetings, were in the best position to know the status of their company and its needs (16 T. 1969, 1987, 20 T. 2477-2478, 2484).

made out to the corporation to petitioners' bank accounts (13 T. 1652-1695, 14 T. 1696-1802, 15 T. 1803-1827). Based on his examination, he was able to prepare charts or summaries based on the corporate records and the records of the personal bank accounts which had been admitted in evidence (13 T. 1609-1612, 14 T. 1724). From these charts, the jury could ascertain how much the corporation collected from the public investors (13 T. 1674, 14 T. 1696) and how much went to each petitioner. Rome repeatedly testified that his summaries were based on his audit of the exhibits of record (*e.g.*, 13 T. 1658, 1687, 14 T. 1698, 1703, 1714-1720, 15 T. 1807, 1815). Some of his compilations were corroborated by other evidence, furnished by one of petitioners (16 T. 2026, 2028), and by one of their former employees, who was able to connect the issuance of corporate securities with the deposit of checks from the investors to petitioners' personal accounts (24 T. 2949, 25 T. 3032). In these circumstances, the summaries, based upon competent evidence already before the jury, were admissible as a convenient and desirable aid to a jury's understanding of a long and complicated set of facts. *United States* v. *Rath*, 406 F. 2d 757 (C.A. 6), certiorari denied, 394 U.S. 920; *Swallow* v. *United States*, 307 F. 2d 81, 84 (C.A. 10), certiorari denied, 371 U.S. 950. Moreover the trial court instructed that the charts were matters of convenience, to be used by the jurors only to the extent that they found that they were based on the evidence admitted at trial (4 R. 48).

6. Petitioner Tarvestad argues (Pet. 38-40), that the government had the burden of proving his mental responsibility beyond a reasonable doubt. The trial court so instructed (4 R. 53-56).[6] Nor did the government fail to meet its burden in this respect.

Before trial, at the request of the defense, petitioner Tarvestad was committed for a medical examination by federal authorities (1 R. 79-81). The medical facility submitted a report to the trial court stating its opinion that Tarvestad was sane and rational. The court thereupon found him competent to stand trial (1 R. 115-119, 123-124). At trial, defense psychiatric evidence was presented (18 T. 2174, 2293). It was contradicted by a government psychiatrist who had examined petitioner Tarvestad and the records kept of his mental condition while he was a patient at the federal medical facility from November 1966 to February 1967 (24 T. 2856, 2866-2867). The government doctor described the drug placidyl—which Tarvestad had taken during 1964 and 1965 and which was the basis of Tarvestad's defense of mental incompetency (see Pet. 13)—as being similar to phenobarbital.[7] In addition, lay witnesses testified that Tarvestad appeared to be normal dur-

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[6] Accordingly, there is no reason here to reach the alleged conflict between the Third and Eighth Circuits (Pet. 38-39) regarding when the defendant has sufficiently introduced evidence of insanity as to require the government to prove sanity beyond a reasonable doubt.

[7] It was also described as a non-barbiturate sedative, with a sleep inducing effect, a sleeping pill designed to reduce tension (17 T. 2105-2106).

ing the period encompassing the offenses charged (23 T. 2826-2830, 2836-2841, 24 T. 2936-2939). During this time, petitioner Wyum noticed nothing unusual about petitioner Tarvestad's behavior (22 T. 2709). Tarvestad was able to recall past events (15 T. 1880), and acknowledged that he was active in the operation of the corporation and that he arranged the newspaper advertisements for the sales of securities to the public (16 T. 1986, 1996, 2020). In short, as the court below held, "the evidence of competency was properly submitted to the jury" under proper instructions (5 R. 15).[8]

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[8] It is further asserted that the defense was deprived of the right to examine notes which Rome used to refresh his recollection (Pet. 32-33). It appears that Rome testified from exhibits he had made, summaries of his audits. His exhibits (Nos. 291-296) were themselves admitted in evidence. We have been unable to find any indication that Rome needed to have his memory refreshed by an examination of any record which was not placed in evidence. Moreover, the court seems to have been aware of the correct rule, that counsel for the other side could examine such memorandum, if used to refresh recollection, even though it was not received (20 T. 2482).

As to the prejudicial publicity which petitioner now asserts occurred (Pet. 35), petitioner fails to indicate when and how such "virulent and inflammatory * * * publicity" (*id.*) was raised at trial and did not raise the point on appeal below. The court cautioned the jurors several times (*e.g.*, 1 T. 107, 13 T. 1695, 16 T. 2047, 20 T. 2535) not to discuss the case. Nor is there any indication at trial that defense counsel brought the matter of prejudicial publicity to the court's attention.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1969

No. 1050

LEE E. TARVESTAD and

GEORGE A WYUM,

Petitioners,

v.

UNITED STATES OF AMERICA

REPLY BRIEF

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REPLY BRIEF

ISSUED RAISED IN BRIEF OF UNITED STATES IN OPPOSITION

The Government, at page 12, of the brief in opposition, states that petitioner Tarvestad, at the request of the defense, was committed for a medical examination by federal authorities, citing Record 79-81.

This is incorrect. Record 78-81 is an order committing the defendant for medical examination, but the commitment was made on the Government's motion (Record 53-59), and supported by an affidavit of the Government (R. 70-71) and the Government's brief in support of its motion (R. 72-3). We believe it is a matter of some importance that the Government took the initiative in having the psychiatric examination made.

Similarly, the Government seems to be attempting to create an issue as to the addition to Placidyl, claiming, on page 12, of its brief in opposition, that Placidyl is "similar to phenobarbital" and a "non-barbiturate sedative, with a sleep inducing effect, a sleeping pill designed to reduce tension". The evidence is very clear

Placidyl is addictive, and Lee Tarvestad was addicted to it. See testimony of Dr. Kohlmeyer generally (Tr. 2291-2371 - and particularly 2314-16).

ADDITIONAL REFERENCES TO TRANSCRIPT

With apologies for omitting them in our original brief, we would like to add the following page references to the transcript to support the arguments in our original brief:

Point V - Transcript 2487, 2453.

Point VI - Transcript 1772-3.

Point VII - Transcript 1688, 1703, 1716, 1763, 1764, 1785, 1786.

Dated February 13, 1970.

Respectfully submitted,

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I, Clara Karls, stenographer in the office of Robert Vogel, attorney of record for George A. Wyum, one of the appellants herein, depose and say that on February 14, 1970, I served a copy of the foregoing

REPLY BRIEF

on the United States of America, appellee herein, by mailing a copy thereof, in a duly addressed envelope, with air mail postage prepaid, to

Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D.C.

and by mailing a copy thereof, in a duly addressed envelope, with first class postage

prepaid, to

Harold O. Bullis
United States Attorney
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counsel of record for said appellee.

Clara Karls

Subscribed and sworn to before me

this 14th day of February, 1970.

Lois J. Helmer
Notary Public
Morton County, North Dakota
My commission expires:
July 19, 1974.

(SEAL)